IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-211

MARION DOMERACKI,

Respondent,

v.

HUMBLE OIL & REFINING CO.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Constitutional Provision Cited	2
Statement of the Case	2
Reasons for Grantng the Writ	3
Introduction	3
I. A Purely Prospective Ruling by a Federal Court Is Prohibited by the Case and Controversy Requirement of Article III of the Constitution	3
II. Even Assuming That Pure Prospectivity Is Constitutionally Permissible, the Court Below Erred in Ignoring Criteria Established by This Court Which Necessitated Application of New Judicial Precedent to the Litigants Before the Court	6
A. There Is No Justification for a Purely Prospective Ruling in a Case of First Impression	6
B. There Is No Justification for a Purely Prospective Ruling When the New Judicial Precedent Goes to the Fairness of the Trial and Influences the Very Integrity of the Fact-Finding Process	8
C. A Party Who Brings About an Innovative Principle of Law Is Entitled to the Benefits of the Ru Announced	10
Conclusion	11
Appendix:	
Opinion	14
Order	23
Opinion of the Court	24
Judgment	37
Excerpt From Article III of the United States Constitution	38

TABLE OF CASES CITED.

	Page
Central Nat'l. Bank of Cleveland v. United States, 41 F. Supp. 239 (Ct. Cl. 1941)	8
Cipriano v. City of Houma, 395 U. S. 701 (1969)	7
Desist v. United States, 394 U. S. 244 (1969)	3, 8
Fairbanks v. Schaibe, 375 P. 2d 201 (1962)	10
Linkletter v. Walker, 381 U. S. 618 (1965)	4, 6
Mapp v. Ohio, 367 U. S. 643 (1961)	6
Moiltov v. Kaneland Community Unit Dist., 163 N. E. 2d 89 (1959)	10
Rampone v. Wanskuck Bldgs., Inc., 227 A. 2d 586 (R. I. 1967)	10
Safarik v. Udall, 304 F. 2d 944 (D. C. Cir. 1962)	7
Simpson v. Union Oil Co. of California, 396 U. S. 13 (1969)	5, 11
Stovall v. Denno, 388 U. S. 293 (1967)	4, 11
United States ex rel. Allison v. New Jersey, 418 F. 2d 332 (3rd Cir. 1969)	9
United States v. Cocke, 399 F. 2d 433 (5th Cir. 1968)	7
United States v. Est. of Donnelly, 397 U. S. 286 (1970)	3, 6, 7
United States v. Sorenson, 308 F. Supp. 1268 (E. D. N. Y. 1970)	9
Webb v. Zern, 220 A. 2d 853 (Pa. 1966)	10

AUTHORITIES CITED.

	Page
Note, Limitation of Judicial Decisions to Prospective Operation, 46 Iowa L. Rev. 600 (1961)	7
Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907 (1962)	4
1B Moore's Federal Practice ¶ 0.402 [3.-2-1] (2d ed. 1965)	3
1B Moore's Federal Practice ¶ 0.402 [3.-2-4] (2d ed. 1965)	7

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Humble Oil and Refining Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on May 18, 1971.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 312 F. Supp. 374 (E. D. Pa. 1970) and is printed *infra*, p. 14. The opinion of the Court of Appeals for the Third Circuit is as yet unreported and is printed *infra*, p. 24.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 18, 1971, *infra*, p. 37. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

I. IS NOT A PURELY PROSPECTIVE RULING BY A FEDERAL COURT PROHIBITED BY THE CASE AND CONTROVERSY REQUIREMENT OF ARTICLE III OF THE CONSTITUTION?

II. ASSUMING THAT PURE PROSPECTIVITY IS CONSTITUTIONALLY PERMISSIBLE,

A. Can such a ruling be made in a case of first impression?

B. Can such a ruling be made when the new judicial precedent goes to the fairness of the trial and the integrity of the fact-finding process?

C. Is a party who brings about an innovative principle of law entitled to the benefits of the rule announced?

CONSTITUTIONAL PROVISION CITED.

United States Constitution, Article III, Section 2 (Appendix p. 38).

STATEMENT OF THE CASE.

On February 25, 1964, Marion Domeracki, a longshoreman, suffered personal injuries aboard petitioner's vessel, the SS Esso Lima. Following trial before a jury, the trial court directed a verdict for plaintiff and entered judgment on that verdict in the sum of $270,982. The petitioner then filed motions asserting, *inter alia*, that the verdict was excessive, that the trial court erred in failing to grant a new trial when it became known to the court that the jury failed to follow the court's instructions with regard to damages; and that the court erred in failing to give instructions to the jury concerning the effect of income taxes on the verdict.

There followed an appeal from the decision of the trial court, handed down February 26, 1970, denying defendant's motions. That appeal was argued before the United States Court of Appeals for the Third Circuit on March 29, 1971. The Circuit Court affirmed the judgment of the District Court on all grounds asserted by petitioner. However, the appellate court did hold that the requested instruction concerning the effect of income taxes on the verdict, although not to be applied to the parties litigant, must in the future be the law of the Third Circuit. This prospective ruling is the subject of this petition.

REASONS FOR GRANTING THE WRIT.

Introduction.

As is so often the case, a very narrow issue raises some of the most far-reaching constitutional problems. This petition is mandated by Mr. Justice Harlan's statement in *Desist v. United States*, 394 U. S. 244, 258 (1969), "'Retroactivity' must be rethought." Although made in connection with a criminal case, the statement was not intended to exclude civil cases, *United States v. Est. of Donnelly*, 397 U. S. 286, 295 (1970). The only point of law raised by this petition is whether the court below erred in denying petitioner the benefit of its prospective holding that, *in the future*, a trial judge must honor a request by counsel to instruct the jury that any award will not be subject to federal taxes and that the jury shall not add or subtract taxes in fixing the amount of the award.

I. A Purely Prospective Ruling by a Federal Court Is Prohibited by the Case and Controversy Requirement of Article III of the Constitution.

The general rule is that new judicial precedents normally operate retroactively as well as prospectively. *1B Moore's Federal Practice* ¶ 0.402 [3.-2-1], p. 171 (2d ed. 1965): A state court, uninhibited by any constitutional requirements, may apply a newly announced judicial precedent in one of three ways: (1) to conduct occurring subsequent to the announcement only; (2) to conduct occurring subsequent to the announcement and also to the present litigants; or (3) to conduct occurring subsequent to the announcement, to the present litigants, and also to conduct which occurred prior to the announcement. A federal court's choices are more limited.

The first technique described above is commonly termed a "purely prospective" ruling since it does not apply even to the parties before the court. *Linkletter v. Walker,* 381 U. S. 618, 621-622 (1965). This alternative is not available to a federal court because of the restrictions of Article III of the United States Constitution.

The foremost objection to denying the benefits of a new rule to the litigants at bar and awarding them only to future litigants is that such a limitation makes the articulation of the new rule only dictum—since it does not apply to the appealing litigants, it is not necessary to the decision made. Article III, Section 2 of the Constitution limits the judicial power of the federal courts to adjudicating "cases" or "controversies". A federal court may resolve only actual and concrete cases and controversies; it may not render an advisory opinion by entertaining abstract and hypothetical questions. New judicial precedent which is made purely prospective and is therefore not applicable to the parties before the court is no more than dictum and is in fact a constitutionally impermissible advisory opinion. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 Yale L. J. 907 (1962).

Minimum constitutional standards require that a party who brings about an innovative principle of law be given the benefit of that new rule. This Court, in some of its latest pronouncements on point, has expressed a willingness to accept this restriction on the judicial alternatives of federal courts. In *Stovall v. Denno,* 388 U. S. 293, 301 (1967), Mr. Justice Brennan, speaking for this Court, stated that:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence

> of the necessity that constitutional adjudications not stand as mere dictum. *Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decision.*" [Emphasis supplied.]

Likewise, in the recent civil case of *Simpson v. Union Oil Co. of California*, 396 U. S. 13, 15 (1969), this Court in a *per curiam* opinion stated that:

> "Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual. . . ."

In the instant case, the court below held that its ruling was to operate in a purely prospective manner and was to have no application to the litigants presently before the Court. This promulgation of a purely prospective ruling is constitutionally impermissible. Article III of the Constitution requires the Circuit Court to apply the new precedent to the litigants who brought about the innovative principle which that court approves.

The decision below flaunts the mandates of the United States Constitution and the policy of this Court. The court below would have been well-advised to heed the admonition of Mr. Justice Harlan that,

> ". . . once the decision to abandon precedent is made, [there is] no justification for applying principles determined to be wrong, be they constitutional or other-

wise, to litigants who are in or may still come to court." *United States v. Est. of Donnelly*, 397 U. S. 286, 295-296 (1970).

In fact, to refuse to resolve this question would be to waste the opportunity to prevent civil cases from becoming mired in the procedural and doctrinal confusion characteristic of criminal cases involving this same basic question.

II. Even Assuming That Pure Prospectivity Is Constitutionally Permissible, the Court Below Erred in Ignoring Criteria Established by This Court Which Necessitated Application of New Judicial Precedent to the Litigants Before the Court.

A. There Is No Justification for a Purely Prospective Ruling in a Case of First Impression.

This Court in *Linkletter v. Walker, supra,* examined the question of whether the constitutional requirements of *Mapp v. Ohio*, 367 U. S. 643 (1961), operated retrospectively upon cases finally decided in the period prior to *Mapp.* After noting that no distinction should be drawn between civil and criminal cases, Mr. Justice Clark outlined the criteria to guide a court in determining whether a new judicial precedent should operate retrospectively or prospectively:

> "[A court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 387 U. S. at 629.

A federal court contemplating a prospective ruling must adhere to these directives and remember that "'pure

prospectivity', even if constitutionally permissible, must be a matter of judicial grace sparingly invoked." *United States v. Cocke,* 399 F. 2d 433, 451-452 (5th Cir. 1968).

In most instances where a court is faced with the question of prospectivity, a rule of law has been overruled and replaced with new judicial precedent. Thus, *Linkletter* focuses on the prior history of the rule in question. "The impulse to make a new decisional rule nonretroactive rests, in civil cases . . . , upon the same considerations that lie at the core of *stare decisis,* namely to avoid jolting the expectations of parties to a transaction." *United States v. Est. of Donnelly, supra* at pp. 295-296 (1970). This bond of justifiable reliance links almost all of the cases refusing to apply a decision retroactively. That is to say, courts ordinarily will give prospective effect to an overruling decision only where persons have contracted, acquired rights, or acted in reliance on a prior decision, and where the operation of the later decision retrospectively would result in substantial harm to such persons. *Cipriano v. City of Houma,* 395 U. S. 701, 706 (1969); *Safarik v. Udall,* 304 F. 2d 944, 949-950 (D. C. Cir. 1962); see Note, *Limitation of Judicial Decisions to Prospective Operation,* 46 Iowa L. Rev. 600, 601 (1961).

Professor Moore also agrees that the overwhelming majority of cases in which an overruling decision has been denied retroactive effect have turned on the issue of reliance. *1B Moore's Federal Practice* ¶ 0.402 [3-2-4], p. 207 (2d ed. 1965). He then raises this query:

> "If justifiable reliance is the only justification . . . for limiting a judicial decision to prospective effect, what justification can be advanced to support the imposition of a similar limitation upon a decision in a case of first impression?"

The observations of Professor Moore are extremely pertinent to the present controversy. The court below recognized that the propriety of a cautionary charge on taxes was an open question in the Third Circuit. There was, therefore, no prior rule of law on which the parties could have justifiably relied since "the rule of *stare decisis* is only applicable where the law has been settled, not when it is uncertain." *Central Nat'l. Bank of Cleveland v. United States*, 41 F. Supp. 239, 247 (Ct. Cl. 1941). Nevertheless, the court below chose to make its ruling purely prospective even though the case before it lacked any element of justifiable reliance which would have warranted such a decision.

There is no conceivable way in which application of the newly formulated judicial precedent to the parties before the court could have jolted the expectations of either litigant; there is no way in which such application would have harmed or prejudiced either litigant. Indeed, the court below stressed that without the benefit of a cautionary charge on taxes, a typical jury of tax-conscious Americans might not be able to properly fix the correct amount of an award in a personal injury action. Since there is no justification for a purely prospective ruling in a case of first impression, the dictates of sound decision-making required the court below to apply its new principle of law to the parties before the court.

B. There Is No Justification for a Purely Prospective Ruling When the New Judicial Precedent Goes to the Fairness of the Trial and Influences the Very Integrity of the Fact-Finding Process.

One of the guidelines controlling the retroactive application of newly announced decisions governing criminal procedure, as laid down by this Court in *Linkletter v. Walker, supra,* focused on the purpose and effect of the rule

in question. In *Desist v. United States, supra,* the Court ruled that primary consideration should be given this criterion. The one purpose which has uniformly been considered to be fulfilled by retroactivity is preservation of the integrity and reliability of the fact-finding process. *United States ex rel. Allison v. New Jersey,* 418 F. 2d 332, 336 (3rd Cir. 1969). Thus, "where the combination of factors in the new rule affects the integrity of the fact finding or truth determining process so as to render it unreliable" this Court has consistently held that application of the new rule to the litigants at bar is justified. *United States v. Sorenson,* 308 F. Supp. 1268, 1273 (E. D. N. Y. 1970) and cases cited therein.

The court below indicated that this was an element considered in reaching its decision when it stated,

> "The very purpose of a cautionary instruction is . . . . to dispel a possible misconception in the minds of the jury that the government will make a valid claim to a portion of the award. Its effect is simply to dissuade juries from improperly increasing the award because of this mistaken belief."

Surely no rule could be more intimately related to the integrity of the fact-finding process than the one in question. The purpose behind the lower court's decision was to aid the jury in properly determining a factual matter, namely, the proper amount of damages to award the plaintiff; and the court below, mindful of the pervasive impact of taxation, recognized that without this cautionary charge a tax-conscious jury might mistakenly award the plaintiff more than that to which he is lawfully entitled.

The facts of the instant case are peculiarly pertinent, because they demonstrate an obvious confusion on the jury's part to understand the trial judge's instructions on

damages. Without here detailing all the relevant circumstances (pp. 22, 25-26), it is sufficient to note that the trial judge felt that the jury's verdict was not computed in accordance with his instructions. Here a novel rule of law has been advanced and adopted. Case law requires that such a rule be applied to the litigants at bar if the rule influences the integrity of the fact-finding process. Since it is a basic tenet of our judicial system that a jury's deliberations remain confidential, seldom, if ever, can there be stronger evidence of some taint on the fact-finding process. And no case can more clearly require that the new rule of law be adopted with respect to the instant parties as well as future litigants.

The new rule in question did have the primary purpose of enhancing the reliability of the fact-finding, and it directly related to the integrity of the trial process. Hence, the refusal of the court below to extend the benefits of the new rule to the petitioner made it utterly impossible for the petitioner to receive the fair and impartial hearing to which it was entitled.

C. A Party Who Brings About an Innovative Principle of Law Is Entitled to the Benefits of the Rule Announced.

In a substantial number of cases in which a party has succeeded in persuading an appellate court to establish a new rule favorable to him, the court has applied the rule to him and prospectively as to future litigants. *Rampone v. Wanskuck Bldgs., Inc.*, 227 A. 2d 586 (R. I. 1967); *Webb v. Zern*, 220 A. 2d 853 (Pa. 1966); *Fairbanks v. Schaible*, 375 P. 2d 201 (1962); *Molitor v. Kaneland Community Unit Dist.*, 163 N. E. 2d 89 (1959). The rationale supporting such rulings is twofold: (1) That there will be no incentive to a plaintiff to seek to have a new rule established, that is, to

improve the law, if he is to get nothing for his pains if he succeeds, and (2) That it is unfair to the party who has fought the case, sometimes through several courts, to tell him that he is right, but that he is to receive nothing for his efforts or his expenses.

Pure prospectivity, which does not apply a new rule of law to the litigants at bar, tends to diminish the incentive of parties to seek changes in the law. This inhibition of the initiative of litigants to seek changes in the law clearly stifles the growth and development of the law and was expressly denounced in *Stovall v. Denno, supra* at p. 301 (1967).

Most recently, in *Simpson v. Union Oil Co. of California, supra* at p. 14 (1969), this Court reversed a purely prospective lower court ruling in a *per curiam* opinion which stated that it was error for the lower court "to deny the fruits of successful litigation to the petitioner". This same reasoning makes it apparent that the court below seriously erred in failing to grant the petitioner the benefit of the innovative principle of law which it had brought about.

CONCLUSION.

A purely prospective ruling by a federal court is in derogation of the case and controversy requirement of Article III of the United States Constitution. By denying the beneficial application of an innovative principle of law to litigants whose efforts have produced the innovation, a purely prospective ruling makes the articulation of the new rule no more than dictum and therefore an impermissible advisory opinion. Minimum constitutional standards demand that a newly-formulated rule of law be applied to the parties involved in the immediate litigation.

Even assuming *arguendo* that pure prospectivity is constitutionally permissible, the criteria set forth by this Court require application of the new rule in question to the parties in the instant case. The court below ruled in this case of first impression that upon request, a cautionary instruction on taxes would be given to all future personal injury actions in the Third Circuit. The court below declined, however, to apply the new rule to the instant controversy. This action is at variance with strong authority indicating that the impossibility of justifiable reliance in a civil case of first impression eliminates all justification for a purely prospective ruling.

The new rule in question has the primary purpose of enhancing the reliability of the fact-finding and hence is directly related to the integrity of the trial process. Surely this is one of the "positive and persuasive reasons for giving the cautionary instruction". How the court below could ignore this factor and maintain that refusal to give the instruction would in no way prejudice petitioner is utterly incomprehensible.

There are also policy considerations which mitigate against the use of purely prospective rulings. Refusal to apply the newly formulated rule to petitioner in this case deprives it of the benefit of its effort and expense. Pure prospectivity destroys any incentive of litigants or lawyers to have a new rule of law established.

This court should avail itself of the opportunity to rule definitively on the constitutionality of purely prospective rulings in civil cases. A clear mandate from this Court would aid sound decision-making and judicial uniformity in the federal courts and would at the same time rescue civil litigation from the retroactivity versus prospectivity quagmire that has unfortunately plagued the area of criminal litigation.

Once a court determines to blaze a new legal trail by establishing a fresh rule of law there is no justification for its refusal to apply that rule to the litigants who have prompted the court to act. The mandates of the Constitution, the policies of this Court, and all notions of justice demand that petitioner be awarded the fruits of its successful litigation.

Respectfully submitted,

JAMES F. YOUNG,
RAYMOND T. LETULLE,
JOHN C. DETWEILER,
Counsel for Petitioner.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 37907.

MARION DOMERACKI

v.

HUMBLE OIL & REFINING CO.

OPINION.

LUONGO, *J.* FEBRUARY 26, 1970

Marion Domeracki, a longshoreman, was seriously injured while loading stores aboard the defendant's vessel, the SS Esso LIMA. In this action, Domeracki contended that his injuries were caused by the unseaworthiness of the vessel and the defendant's negligence in failing to maintain a reasonably safe place to work. The court submitted eight interrogatories to the jury for its consideration. Pursuant to the jury's answers thereto,[1] I directed a verdict for the plaintiff and entered judgment accordingly on May 22, 1969.

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1. The following are the interrogatories submitted to the jury, and the answers thereto:

"1. Did defendant shipowner breach the absolute duty to furnish a safe and seaworthy vessel

(a) by furnishing defective equipment?
Yes X No

(b) by failing to furnish adequate equipment?
Yes X No

Presently before me are defendant's motions under Rule 50, F. R. C. P., for judgment notwithstanding the verdict, or, in the alternative, for a new trial. In support of these motions, defendant has set forth the following grounds: (1) the verdict was contrary to the evidence and against the weight of the evidence; (2) the verdict was excessive and given under the influence of passion and prejudice; (3) the jury should have been withdrawn when plaintiff's counsel improperly referred to a separate indemnity action between defendant and plaintiff's employer; (4) defendant's request for certain points for charge should have been granted; (5) instructions to the jury on "proximate causation" were inadequate; (6) cautionary instructions on the effect of federal income taxes on the damages awarded should have been given to the jury; (7) the defendant either should have been permitted to

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Note 1—*continued.*

(c) by permitting an improper method of operation in the loading of stores?

Yes X No

"2. If you have answered "YES" to any of the parts of Interrogatory No. 1, was plaintiff's injury proximately caused by defendant's breach of duty set forth in

1(a)? Yes X No
1(b)? Yes X No
1(c)? Yes X No

"3. Was defendant shipowner negligent in failing to provide a reasonably safe place for plaintiff to work?

Yes X No

"4. If your answer to Interrogatory No. 3 is "YES", was plaintiff's injury proximately caused by that negligence?

Yes X No

"5. In what amount do you assess plaintiff's damages?

$270,982.00

"6. Was plaintiff guilty of contributory negligence?

Yes No X

"7. If your answer to Interrogatory No. 6 is "YES", to what extent (stated in percentage) did plaintiff's negligence contribute to his injury?

——%

impeach the jury's verdict, or should have been granted a new trial when it became known to the court that the jury failed to follow the court's instructions with regard to damages.

The defendant's motions will be denied.

(1) Viewing the evidence in the light most favorable to the plaintiff (*Lind v. Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir. 1959), *cert. denied*, 364 U. S. 835 (1960)), the jury could reasonably have found the facts to be as follows:

On the afternoon of September 25, 1964, Domeracki was a member of a work crew assigned by his employer, the Philadelphia Ship Maintenance Co., to load stores, including 3 or 4 heavy crates of machinery weighing 300-350 pounds each, aboard the SS Esso Lima. Although the vessel's mate was aware of the size and weight of the crates, he deneid the request of the foreman of the work crew to use the ship's boom for loading the stores. The foreman then ordered his crew to load the stores by passing them through the pipe rail, an opening in the railing of the ship crossed by two chains which lock onto the side railing. The lower chain was disengaged and dropped, but the longshoremen were unable to free the upper chain because the lock was rusted and frozen. The mate was informed that the chain was frozen but he did nothing to correct it, telling the foreman to do the best he could. The work crew then proceeded to attempt to load the stores by passing them through the opening between the lip of the ship and the upper chain. The mate was on deck in the vicinity while the loading operation was going on. While one of the heavy crates of machinery was being thus loaded it was blocked by the upper chain. Domeracki lifted the chain and at the same time pressed down on the crate to permit his co-workers to push the crate onto the deck. While plaintiff was in this precarious position, the crate

slipped and plaintiff felt a sharp pain in his back. He was unable to perform further duties that day.

Plaintiff offered expert testimony to the effect that the method utilized to load the stores was improper; that the ship's boom should have been made available to the longshoremen; and that the upper chain should not have been frozen.

As a result of the occurrence, plaintiff suffered two herniated discs. One was corrected by surgery, but plaintiff refused further surgery because of fear and uncertainty as to the success of a second operation. Donieracki's doctors testified that he will continue to suffer pain in his back and numbness in his leg, and that he will no longer be able to perform manual labor.

By its answers to the court's interrogatories, the jury found that defendant breached its duty to furnish a seaworthy vessel (a) by furnishing defective equipment (the frozen chain); (b) by failing to supply adequate equipment (the ship's boom); and (c) by permitting an improper method of loading; that defendant was negligent in failing to provide a reasonably safe place for plaintiff to work; that plaintiff was not contributorily negligent; that defendant's failure to maintain a seaworthy vessel and the defendant's negligence were the proximate causes of plaintiff's injuries, and assessed damages in the total amount of $270,982.

The jury's special verdict as to defendant's breaches of duty and causation was based on ample evidence and consequently the verdict must stand. Cf. *Blackburn v. Aetna Freight Lines, Inc.*, 250 F. Supp. 289 (W. D. Pa.), *aff'd*, 368 F. 2d 346 (3d Cir. 1966); *Tarter v. Souderton Motor Co.*, 257 F. Supp. 598 (E. D. Pa. 1966).

(2) Defendant contends that the $270,982 award was excessive and that it was the result of passion and preju-

dice occasioned by plaintiff's counsel's remarks during summation concerning the then recent discovery by the corporate defendant of huge oil reserves in Alaska. The defendant, however, failed to object to the remarks at the time and is precluded from raising the objection now. *Uhl v. Echols Transfer Co.*, 238 F. 2d 760, 765 (5th Cir. 1956); *Levin v. Trans World Airlines, Inc.*, 201 F. Supp. 791 (W. D. Pa. 1962); *Russell v. Monongahela Ry. Co.*, 159 F. Supp. 650 (W. D. Pa.), *aff'd*, 262 F. 2d 349 (3d Cir 1958). In any event the remarks were not so prejudicial as to justify a new trial, particularly in view of the cautionary instructions given to the jury. Cf. *Marchant v. American Airlines, Inc.*, 146 F. Supp. 612 (D. C. R. I. 1956), *aff'd*, 249 F. 2d 612 (1st Cir. 1957).

As to the amount of the award, although high, it was within reasonable limits. The evidence established that past medical expenses and loss of earnings totalled approximately $31,000. At the time of trial, the plaintiff had a life expectancy of approximately 34 years and had little chance of rehabilitation. Even under defendant's assuredly conservative figures, the present worth of plaintiff's future earnings loss would be at least $100,000. The jury could very properly have awarded $140,000 for past and future pain and suffering and loss of life's pleasures. The award was based on sufficient evidence and was not so high as to shock the conscience of the court. *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3d Cir.), *cert. denied*, 379 U. S. 913 (1964); *Russell v. Monongahela Ry. Co.*, 262 F. 2d 349 (3d Cir. 1958); *Mainelli v. Haberstroh*, 237 F. Supp. 190 (M. D. Pa. 1964), *aff'd per curiam*, 344 F. 2d 965 (3d Cir. 1965).

(3) During the summation by plaintiff's counsel, reference was made to a separate indemnity action instituted by the defendant against the plaintiff's employer. Defendant

immediately objected, and I gave cautionary instructions to the jury to disregard the remarks and admonished counsel for having made them. I cannot understand how the comment can be considered prejudicial in light of the fact that in most suits by longshoremen against vessels, the indemnity action by the vessel against the stevedore is tried before the same jury as a third-party action in the longshoreman's suit. Again, however, whatever prejudice might have resulted was eliminated by cautionary instructions. Cf. *Marchant v. American Airlines, Inc., supra.*

(4) Defendant's counsel requested certain points for charge (notably his numbers 12-15 inclusive).[2] I refused to charge the jury precisely as defendant requested and defendant took exceptions.

One request, although couched in terms of contributory negligence, actually sought an instruction charging plaintiff with assumption of risk. Assumption of the risk, however,

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2. The points requested by defendant's counsel were as follows:

"12. If you believe that Mr. Domeracki continued to work under conditions such as the stuck chain rail, improper use of equipment and failure to inspect the area in which he worked, and the conditions were known to him as likely to cause harm and he was hurt, you may find that Mr. Domeracki was contributorily negligent and should deduct from any recovery whatever percentage you find he contributed to his own injury.

"13. The vessel owner cannot be held responsible for the negligence of the fellow employees of plaintiff unless the facts indicate that the owner or the vessel's agent knew or should have known of the existence of a dangerous condition. (Citations omitted).

"14. The operational negligence of otherwise seaworthy equipment by a fellow longshoreman does not make a vessel unseaworthy. (Citations omitted).

"15. If you find that the cause of plaintiff's injury was not the ship, its appurtenances, or its crew, but the isolated and unforeseeable introduction of an improper loading method by the independent employees hired by the vessel then the defendant cannot be held liable. Morales v. City of Galveston, 370 U. S. 165 (1962).

is not a defense in longshoremen cases. 46 U. S. C. § 688, 45 U. S. C. § 54; *Adams v. United States*, 393 F. 2d 903 (9th Cir. 1968). A proper instruction was given to the jury on contributory negligence to the effect that plaintiff would be contributorily negligent only if he failed to act with reasonable care under all the circumstances, including the hazardous conditions. See *Ktistakis v. United Cross Navigation Corp.*, 316 F. 2d 869 (2d Cir.), *appeal after remand*, 324 F. 2d 728 (2d Cir. 1963), *cert. denied*, 377 U. S. 915 (1964).

Another request for charge presented by defendant sought an instruction to the effect that the vessel owner was not liable if he did not have actual or constructive notice of the hazardous conditions. Notice, or the lack thereof, is no defense to the unseaworthy condition of the vessel. *Poignant v. United States*, 225 F. 2d 595 (2d Cir. 1955). A proper instruction was given to the jury, however, to the effect that a shipowner's duty to maintain a reasonably safe place to work requires that the shipowner have actual or constructive knowledge of the hazardous conditions. See *Guitierrez v. Waterman Steamship Corp.*, 373 U. S. 206, *reh. denied*, 374 U. S. 858 (1963).

Defendant also requested a charge on "operational negligence." This doctrine holds that negligence by fellow longshoremen in the operation of otherwise seaworthy equipment does not make the vessel unseaworthy. *Price v. SS Faraeuz*, 378 F. 2d 156 (5th Cir. 1967). Since in this case there was unseaworthiness in the failure to furnish adequate equipment (ship's boom) and since there was admittedly unseaworthy equipment (the frozen chain) used by the longshoremen, an instruction on "operational negligence" was not relevant to the case, and the point was properly refused.

Defendant also requested that the jury be charged that an improper method of loading does not make a vessel unseaworthy. In support of that request, defendant errone-

ously relied upon *Morales v. City of Galveston*, 370 U. S. 165 (1962). Both the Supreme Court in *Morales* and the Court of Appeals for this Circuit in *Thompson v. Calmar Steamship Corp., supra*, have held that an improper method of loading may make a vessel unseaworthy. I charged the jury accordingly.

(5) Defendant asserts that the jury's findings that the failure to provide the ship's boom and to properly maintain the upper chain of the pipe railing evidence the jury's misunderstanding of the definition of "proximate causation". This conclusion is grounded on defendant's flat assertion that as a matter of law these events were too remote to be considered substantial factors in causing harm to plaintiff. Defendant states that the jury's confusion was probably due to the failure to reiterate the definition of proximate cause at the time the jury was charged on how to answer the interrogatories.

There was sufficient evidence that these breaches of duty were substantial factors in causing plaintiff's injuries. I cannot assume that the jury misunderstood an admittedly proper instruction or that its memory was so short that the charge should have been repeated.

(6) A verdict awarding damages for future loss of income in a personal injury action is not subject to federal income taxes. 26 U. S. C. § 104. Defendant argues that the jury should have been told that the award to plaintiff would not be subject to federal income taxes.

I see no reason why the defendant should gain a reduction in the verdict because of a tax advantage Congress has granted to the injured plaintiff. The majority rule, which has been consistently adhered to in this district and in other courts in this circuit, is that it is not reversible error to refuse to give an instruction on the income tax effect of an award. *Chicago & N. W. Ry. Co. v. Curl*, 178

F. 2d 497 (8th Cir. 1949); *Culley v. Pennsylvania R. Co.*, 244 F. Supp. 710 (D. Del. 1965); *Altemus v. Pennsylvania R. Co.*, 32 F. R. D. 7 (D. Del. 1963). See *LeRoy v. Sabena Belgian World Airlines*, 344 F. 2d 266 (2d Cir.), *cert. denied*, 382 U. S. 878 (1965); *Girard Trust Corn Exchange Bank v. Philadelphia Transportation Co.*, 410 Pa. 530 (1963); Annot., 63 A. L. R. 2d 1378 (1959).

(7) Defendant's final argument revolves around an unusual incident which took place after the verdict had been recorded and the jury dismissed. At that time, the courtroom clerk handed to me two sheets of yellow scratch paper.[3] One piece of paper contained a notation of the amount awarded by the jury to the plaintiff and the signatures of each of the jurors beneath it. The second sheet contained some computations (the exact nature of which has now happily slipped my memory), which apparently had something to do with the jury's calculations in regard to damages. I made a comment to counsel to the effect that I believed that these computations indicated that the jury failed to follow the court's instructions in regard to damages, (N. T. pp. 390, 398) but I did not permit counsel to see the second sheet of paper.

Counsel for defendant contends that the papers should have been given to him to enable him to impeach the jury's verdict, and that the court's refusal to grant this request is ground for a new trial.

Even if I were to assume that the papers evidence the jury's confusion on calculating damages, the verdict was still proper. Whatever occurred in the jury room

3. The Marshal received the papers from the forelady with the exhibits, and handed all materials to the courtroom clerk after the verdict was recorded. Upon seeing the nature of these papers, the clerk presented them to me.

Both pieces of paper have been sealed and impounded pursuant to my order of may 22, 1969, and will be available for examination by the appellate courts if they deem examination necessary or proper.

"inheres" in the recorded verdcit. *Farmers Co-op Elev. Ass'n Non-Stock v. Strand,* 382 F. 2d 224, 230 (8th Cir.), *cert. denied,* 389 U. S. 1014 (1967), *reh. denied,* 390 U. S. 913 (1968). Cf. *Finn v. Carnegie-Illinois Steel Corp.,* 68 F. Supp. 423 (W. D. Pa. 1946). It was not proper even for the court to examine the content of the papers. By doing so, in effect, the court intruded upon the jury's deliberative process. It would have been highly improper to permit counsel to examine the papers and inquire into the means by which the jury arrived at its proper verdict. Cf. *Chicago, R. I. & P. R. Co. v. Speth,* 404 F. 2d 291 (8th Cir. 1968). The situation here is somewhat analogous to those cases in which the jury adds some commentary to its verdict. It has been consistently held that such gratis comments are to be disregarded and the recorded verdict finalized. See, e.g., *Hong Sai Chee v. Long Island R. Co.,* 328 F. 2d 711 (2d Cir. 1964); *Cleary v. Indiana Beach, Inc.,* 275 F. 2d 543 (7th Cir.), *cert. denied,* 364 U. S. 825 (1960).

Since none of the defendant's contentions have any merit, an order will issue denying defendant's motions for judgment notwithstanding the verdict or in the alternative for a new trial.

ORDER.

It Is Ordered, this 26th day of February, 1970, that defendant's Motions for Judgment Notwithstanding the Verdict or for a New Trial be and they are hereby Denied.

Alfred L. Luongo, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 18886.

MARION DOMERACKI
v.
HUMBLE OIL & REFINING CO.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued March 29, 1971.

Before: HASTIE, *Chief Judge*, and SEITZ and ALDISERT, *Circuit Judges*.

OPINION OF THE COURT

(Filed May 18, 1971)

ALDISERT, *Circuit Judge*.

A judgment of $270,982 was entered on a jury verdict against appellant shipowner and in favor of appellee, a longshoreman who sustained personal injury while loading a ship in port. The jury accepted appellee's contention that his injury was caused by the unseaworthy condition of the vessel and by the failure of the shipowner to provide a safe place to work.[1]

1. The facts are not complicated. Plaintiff-appellee was one of three longshoremen engaged in loading a crate onto the S. S. Esso LIMA. He contended that his foreman requested, and the ship's mate refused to provide, a boom to lift the crate from the dock, thereby necessitating that the crate be manhandled from the dock

Appellant concedes the severity of the injury: appellee suffered herinated discs in his back; only one was corrected by surgery, while the other caused continuing disability. Past loss of earnings amounted to $28,000, medical expenses totaled $3,000, and loss of future earning power over a projected 28 year period approximated $100,000. Appellant contends, however, that the verdict was tainted, and excessive, because the jury (1) failed to adhere to the court's instructions, (2) rendered its verdict under the influence of passion and prejudice purposely induced by appellee's counsel, and (3) deliberated under the mistaken impression that the award would be subject to federal income tax obligations.

I.

The first assignment of error relates to an incident that occurred in the courtroom at the time the verdict was received. The jury had been given special written interrogatories which, together with the replies, were handed by the forelady to the deputy marshal for transmittal to the court. In submitting the interrogatories, however, the forelady inadvertently included two sheets of paper containing certain written matter. It is conceded that these papers were not a part of the jury's verdict and probably constituted scratch paper utilized by the forelady or others during deliberations in the jury room. The trial judge notified counsel that "these papers had inadvertently come into my possession and that I had glanced at them and seen some figures which

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Note 1—*continued.*

to the deck through an opening in the ship's rail. Two removable chains guarded the opening. The lower chain was removed in the loading process, but the upper one could not be removed because it was rusted and frozen. The vessel's mate, although notified of this condition, told the longshoremen foreman to do the best he could. Plaintiff-appellee was directed to board the ship to lift the upper chain and assist in hoisting the crate through the opening. The injuries occurred when he was holding the crate with one hand and lifting the chain with the other.

would cause me to wonder whether they [the jury] had followed the Court's instructions precisely." Subsequently, the court declared: "Upon further reflection I think that what I did was improper in looking at what the jury did, and rather than compound that error, I have impounded these papers. . . . I happen to know, by that inadvertent glance at that piece of paper, how they arrived at [the verdict]. I shall have to do my best to wipe clean from my mind that information which I now have in my head. . . ."

Appellant then moved for a new trial, grounding its motion on the theory that a new trial should be granted when it is apparent that the jury has not followed the court's instructions on damages. Although we do not quarrel with this statement of the controlling abstract principle, the circumstances here preclude our reaching this question. Neither a trial court nor an appellate court has the authority to inquire into the jury's decisional processes, even when information pertaining to the deliberations is volunteered by one of the jurors. "[A]fter reception of the verdict and discharge of the jury, testimony of jurors should be incompetent, under the no-impeachment rule . . ., to illuminate the suspicion [of a failure to follow instructions] by inquiring into their mental processes." 6A MOORE'S FEDERAL PRACTICE § 59.08[4], at 3804.

Long settled considerations of public policy dictate "that mistake of the testimony, misapprehension of the law, error in computation, irregular or illegal methods of arriving at damages, unsound reasons or improper motives, misconduct during the trial or in the Jury Room, cannot be shown by the evidence of the jurors themselves, as the ground of disturbing the verdict, duly rendered," *Capen v. Stroughton*, 82 Mass. (16 Gray) 364, 366 (1860).[2] The

2. *E.g.*, Farmers Co-Op. Elevator Ass'n Non-Stock v. Strand, 382 F. 2d 224, 230-31 (8 Cir. 1967); Complete Auto Transit, Inc. v. Wayne Broyles Eng. Corp., 351 F. 2d 478, 480 (5 Cir. 1965); Lohr

sound justification for the concept that "such matters all inhere in the verdict itself," *Chicago, R. I. & Pac. RR v. Speth*, 404 F. 2d 291, 295 (8 Cir. 1968), is the salutary desire to protect participants in the jury system from being "harrassed and beset by the defeated party. . . . If evidence [obtained from jurors] could be thus used, the result would be to make what was intended to be a private deliberation the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald. v. Pless*, 238 U. S. 264, 267-68 (1915). In short, the district court properly concluded that the information to which he accidentally became privy was incompetent to provide a basis for a finding that the jury failed to adhere to the court's instructions.

II.

Appellant also insists that a new trial should be granted due to the prejudice allegedly created when appellee's counsel suggested that the shipowner would have recourse against any third party responsible for the unseaworthy condition of the ship. Upon objection, the court instructed the jury to "ignore" such remarks: "Members of the jury, you are trying one law suit. You are not here to determine whether the ship has any rights against anybody else." The court previously had told the jury: "You are here to try the case of Marion Domeracki against the Humble Oil and Refining Company. That is the only case you are here to try. Whatever reference may have been made to other litigation, just disregard it. This is the case you are here to try, you are sworn to try, and this is the only one I want

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Note 2—*continued.*

v. Tittle, 275 F. 2d 662, 667 (10 Cir. 1960); Webb v. United States Lines Co., 266 F. 2d 611, 612 (2 Cir. 1959); Thedorf v. Lipsey, 237 F. 2d 190, 194 (7 Cir. 1956); Northern Pac. Ry. v. Mely, 219 F. 2d 199, 201, 202 (9 Cir. 1954); Stiles v. Lawrie, 211 F. 2d 188, 189 (6 Cir. 1954).

you to consider." We are satisfied that these cautionary statements were adequate and that no prejudicial error resulted.

We also find no merit in appellant's additional contention that the jury was improperly influenced by an oblique reference during appellee's closing argument to the financial capacity of Humble Oil.[3] *See United States v. Socony-Vacuum*, 310 U. S. 150, 237-42 (1939). In any case, appellant registered no timely objection to the remark.[4] *Id.* at 239. See Fed. R. Civ. Pro. 46.

III.

Appellant submitted, and the district court refused, the following point for charge:

> I charge you, as a matter of law, that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal income tax law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of federal income taxes.

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3. "Now, do you think, ladies and gentlemen, that a company like Humble Oil, a company who has the investigative ingenuity to strike oil in the Alaskan northern slopes, could not find a witness to refute plaintiff's case, if there was such a witness?"

4. Nor did appellant object to what it now characterizes as an "unwarranted appeal to sympathy" during the closing argument.

> "And remember this, that your award should be such that if you pass Mr. Domeracki on the street 20 years from now or 25 years from now and you see him, as you will, limping in pain and unable to work, that you don't have to walk on the other side of the street because you can't look him in the eye for what you did or for what you didn't do."

Appellant concedes that this somewhat dramatic statement "[s]tanding by itself . . . may not be prejudicial error." Even read in context with the entire closing, we cannot conclude that this remark, or the closing as a whole, created prejudice to justify reversal.

Whether the refusal of this instruction resulted in prejudice sufficient to entitle appellant to a new trial is the question to which we now address ourselves.

It is true, as stated in the requested charge, that awards received by settlement or verdict in personal injury actions are not taxable under the federal income tax laws. Section 104 of the Internal Revenue Code of 1954, 26 U. S. C. § 104 provides:

> (a) *In General*—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc. expenses) for any prior taxable year, gross income does not include—
>
> . . .
>
> (2) The amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . .

But whether this is a fact of which a jury should be apprised, upon a defendant's request for a proper cautionary instruction, is an open question in this Circuit. Other courts, both state and federal, which have considered the question have answered it in different ways.[5] The issue

5. For compilations of the pertinent cases, see Nordstrom, "Income Taxes and Personal Injury Awards," 19 Ohio St. L. J. 212, 214 n.3 (1958); Note, "Income Taxation and Damages for Personal Injuries," 50 Ky. L. J. 601 n.3 (1962). For additional federal cases, see note 15, *infra*. *Hall v. Chicago & N. W. Ry.*, 5 Ill. 2d 135, 125 N. E. 2d 77 (1955), states the majority view that it is error to inform the jury that plaintiff's award will not be taxable. *Dempsey v. Thompson*, 363 Mo. 339, 251 S. W. 2d 42 (1952) stands for the minority position that refusal to give an appropriate cautionary instruction is prejudicial error. Other courts have adopted more flexible rules, holding that the giving of an instruction is discretionary with the trial court, *Anderson v. United Air Lines, Inc.*, 183 F. Supp. 97 (S. D. Calif. 1960), or that the instruction, while proper, is not mandatory, and that a refusal to give a proper instruction is not reversible error. *McWeeney v. New York, N. H. & H. R. R.*, 282 F. 2d 34 (2 Cir. 1960). Finally some of the cases which have

has also generated sharp disagreement among commentators, although a majority appear to favor an appropriately worded charge.[6]

Our analysis begins with the elementary rule of damages in personal injuries actions: a plaintiff should be compensated (1) for monies of which he has been deprived and which presumably he would have received had he not been injured, including wages and earnings, past and future; and (2) for the expenses, inconveniences and suffering which have been thrust upon him by virtue of his injuries. The purpose, then of personal injury compensation is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses.

Insofar as wages are concerned, as (*sic*) injured plaintiff loses only his net or take-home pay, that is, his gross earnings, less taxes. He does not in fact "lose" his gross earnings. Nevertheless, in the three states and one territory of this Circuit, as in most jurisdictions, the courts hold that the gross earnings of the plaintiff, rather than net earnings

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Note 5—*continued.*

found an instruction to be improper can be distinguished on the basis of the wording of the requested charge. In *Maus v. The New York, Chicago & St. Louis R. R. Co.*, 165 Ohio St. 281, 135 N. E. 2d 253, (1956), for example, the requested instruction merely averted to the section 104 exclusion and added that "you must take this fact into consideration in arriving at the amount of your verdict in this case."

6. *Approving an instruction:* II Harper & James, The Law of Torts § 25.12, at 1327-28 (1956); Feldman, "Personal Injury Awards: Should Tax-Exempt Status Be Ignored?" 7 Ariz. L. Rev. 272 (1965); Burns, "A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?" 14 De Paul L. Rev. 320 (1965); Nordstrom, 19 Ohio St. L. J. 212 (1958), *supra*, note 4; Note, 50 Ky. L. J. 601 (1962), *supra*, note 4; 26 Ford. L. Rev. 98 (1957); 4 U. C. L. A. L. Rev. 636 (1957); 25 U. Cin. L. Rev. 385 (1956); 44 Ky. L. J. 384 (1956) 39 Vand. 543 (1956); 11 Wash. & Lee L. Rev. 66 (1954); 42 Geo. L. J. 149 (1953); 32 Tex. L. Rev. 108 (1953). *Opposing instruction:* 35 N. Car. L. Rev. 401 (1957); 42 Iowa L. Rev. 134 (1956); 8 Ark. L. Rev. 174 (1953); 33 B. U. L. Rev. 114 (1953); 21 U. Chi. L. Rev. 156 (1953).

after taxes, are admissible as evidence for the jury's consideration in calculating this item of damages. Thus, the jury is presented not with evidence of wages which plaintiff has actually lost, but sums which, in fact, may be considerably higher depending upon his particular income tax bracket.

Defense attorneys have sought to avoid this result in at least two ways.[7] They have attempted to present evidence of the amount of federal income tax that the plaintiff was paying prior to his injuries in order to offset the "gross income" evidence introduced by the plaintiff. Alternatively, they have requested an instruction that any award will not be subject to federal income tax, and that the jury "should not consider such taxes,"[8] or, more specifically, should not "add or subtract" from any award on account of taxes.[9] The avowed purpose of such a request is to discourage a jury from enlarging an award to the extent it erroneously believes that the plaintiff will be called upon to pay income taxes.

We readily recognize the problems which could result from the introduction of income tax evidence. Shifting tax rates, together with other variables, could give rise to great conjecture, at least as to *in futuro* earnings.[10] Indeed, the

7. See Nordstrom, *supra*, note 4, 19 Ohio St. L. J. at 212-213.

8. *E.g.*, Dempsey v. Thompson, *supra* note 4, 363 Mo. at 339, 251 S. W. 2d at 45.

9. This was the phraseology requested in the instant case and suggested elsewhere. *E.g.*, Nordstrom, *supra* note 4, 19 Ohio St. L. J. at 235; Feldman, *supra* note 5, at 279.

10. Professor Nordstrom recognizes the speculative nature of such evidence but suggests that this factor should not of necessity be defeating.

> This conjecture and speculation could be found in such things as: (1) the family status of the injured party in the years to come; (2) possible changes in the exemption and deduction provisions of the tax law; (3) possible changes in the

tax computation itself could completely overshadow the basic issues of liability and damages. Moreover, recovery for pain, suffering and medical expenses is not measured by one's income and, in any case, would probably not be taxable.[11]

Although some courts and writers have confused the evidentiary issue with the question of a cautionary instruction,[12] we believe that the considerations relating to the former issue have no relevance to the second. The instruction requested in this case would not require the introduction of any additional evidence. No reference to any IRS regulation or to any specific statute would be necessary. No tax expert would need be summoned as a witness. No tax tables would be hauled into the courtroom. No additional computation would be required. In brief, such an instruction would not open the trial to matters irrelevant to traditional issues in personal injury litigation, and thus would in no way complicate the case or confuse the jury.

Moreover, there are positive and persuasive reasons for giving the instruction. We are not unaware of the per-

Note 10—*continued.*

> rates of taxation; and (4) possible changes in the cost of living, thus reflecting itself on the income of the plaintiff. These items are speculative. But are they so speculative that we should refuse to let the defendant even try to show them? Indeed, which is more conjectural: the existence of income tax in this country along the pattern that we now know it, or the continuance of the plaintiff's salary during *exactly the same period*? Yet, we have no real difficulty in letting the jury speculate as to the existence of the latter. We will even let the plaintiff try to show that he might have earned *more* salary in the future. If the plaintiff receives the advantage of the speculation in his favor, why do we bar the defendant from even trying to show what appears to be a smaller speculation in his favor?

Nordstrom, *supra* note 4, 19 Ohio St. L. J. at 227.

11. *See* 42 Iowa L. Rev. 134, 137 (1956) and 8 Ark. L. Rev. 174, 177 (1954), suggesting that a tax would be due if medical expenses had been deducted in a prior year and were currently recoverable.

12. *See, e.g.*, Highshew v. Kushto, 235 Ind. 505, 134 N. E. 2d 555 (1956); 33 B. U. L. Rev. 114 (1953).

vasive impact of taxation—federal, state, and local—in the lives of Americans. It has been properly observed that what we know as men, we should not ignore as judges. We know of the widespread attention given by the media to the tax consequences affecting winners of the Irish Sweepstakes, state-conducted lotteries, and contests conducted on television. We take judicial notice of the "tax consciousness" of the American public.[13] Yet, we also recognize, as did the court in *Dempsey v. Thompson*, 363 Mo. 339, 251 S. W. 2d 42 (1952), that few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code.

> [T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what

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13. [I]t is likely that many jurors, without such an instruction . . . would believe that damage awards are taxable, and would weigh this factor against the defendant. . . . [T]he public press has carried many reports of large sums won on television quiz programs or in lotteries and sweepstakes. These accounts almost always point out that a very large percentage of the winnings must be paid to the government as income tax. It would be natural enough for the layman to conclude that the plaintiff's receipts from the judgment would be taxed.

McWeeney v. New York, N. H. & H. R. R., 282 F. 2d 34, 41 (2d Cir. 1960) (*en banc*) (Lumbard, C. J., dissenting).

> To ignore the tax element at the present day would be to act in a manner which is out of touch with reality. Nor can I regard the tax element as so remote that it should be disregarded in assessing damages. The obligation to pay tax—save for those in possession of exiguous incomes—is almost universal in its application. That obligation is ever present in the minds of those who are called on to pay taxes, and no sensible person any longer regards the net earnings from his trade or profession as the equivalent of his available income. Indeed, save for the fact that in many cases—though by no means in all cases—the tax only becomes payable after the money has been received, there is, I think, no element of remoteness or uncertainty about its incidence.

British Transp. Comm'n v. Gourley, 3 All E. R. 796, 802 (1955).

they think he deserves after the imaginary tax is taken out of it.

II HARPER & JAMES, THE LAW OF TORTS § 25.12, at 1327-28 (1956). The very purpose of a cautionary instruction is merely to dispel a possible misconception in the minds of the jury that the government will make a valid claim to a portion of the award. Its effect is simply to dissuade juries from improperly increasing the award because of this mistaken belief.

Given the absence of complications that an instruction would engender, the tax consciousness of the American public, and the general lack of knowledge about the statutory exclusion, we hold that in personal injuries actions the trial courts in this Circuit must, in the future, upon request by counsel, instruct the jury that any award will not be subject to federal income taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award.

We decline, however, to reverse the judgment of the court below. Two important considerations influence this determination. First, the purpose of the rule which we promulgate for prospective application [14] in this Circuit is to remove the possibility that juries will increase awards based on mistaken considerations of tax consequences. In the case at bar, however, there is no evidence that the jury was in fact so motivated,[15] and because of the settled rule,

14. The Supreme Court of Missouri in *Dempsey v. Thompson*, 363 Mo. 339, 251 S. W. 2d 42 (1952), made prospective only its overruling of the refusal to give a requested cautionary instruction. Our action in giving prospective effect to our ruling is based on our general supervisory power over the district courts in this Circuit. See *McNabb v. United States*, 318 U. S. 332 (1943); *United States v. Fioravanti*, 412 F. 2d 407, 420 (1969).

15. It was this factor that led the Second Circuit to conclude that the failure to give the charge was not reversible error. Acknowledging that the instruction "imposes no new burdens on the jury and there is nothing speculative about it," still Judge Friendly reasoned that

heretofore discussed; that the sanctity of jury deliberations may not be invaded subsequent to the rendition of the verdict, any inquiry is now foreclosed.

Secondly, we recognize that our approach to this problem represents a new view in this judicial circuit as well as in other Circuits.[16] Indeed, the position we adopt has been accepted by only a handful of state jurisdictions. In this situation, it cannot be said that the trial court erred in refusing the instruction at the time it was proffered. Paying even the most scrupulous attention to the sometimes subtle shifting of appellate winds, the district court could not have been expected to forecast the decision we reach here.

In conclusion, after considering all the arguments presented by appellant, we hold that there was no reversible

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Note 15—*continued.*

> [b]efore an appellate court should hold that failure to give such a cautionary instruction was reversbile error, there ought to be evidence either that juries in general increase recovery on this account or that the particular jury did so. The published material on the former point is too slender to support a judgment that juries do this generally, and there is nothing to suggest that this one did.

McWeeney v. New York, N. H. & H. R. R., 282 F. 2d 34, 39 (2d Cir. 1960) (*en banc*).

16. Our research discloses that three Circuits have validated refusals to give a cautionary instruction. Only the Second Circuit, however, has recorded its reasons, and its most recent analysis of the question resulted in a 3-2 *en banc* decision. *McWeeney v. New York, N. H. & H. R. R., supra*, notes 12 and 14. Both opinions in the Fifth Circuit were per curiams, and both disposed of the issue in one sentence. *Cunningham v. Bay Drilling Co.*, 421 F. 2d 1398, 1399 (5th Cir. 1970): "We believe the refusal [of the instruction] was proper." *Prudential Ins. Co. v. Wilkerson*, 327 F. 2d 997, 998 (5th Cir. 1964): "We are of the opinion that the court properly refused to instruct the jury [on the issue]." The Sixth Circuit pronouncements are equally cryptic. In *New York Central RR v. Delich*, 252 F. 2d 522, 527 (6th Cir. 1958), the court concluded simply that "[i]t was not error" to refuse the instruction. In a subsequent decision, the court cited *Delich* and said that no case relied upon by the appellant "stands for a contrary holding." *Payne v. B. & O. R. R.*, 309 F. 2d 546, 549-50 (6th Cir. 1962).

trial error. Moreover, we cannot say that the amount of the verdict shocks the conscience of the court.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 22, 1969, be, and the same is hereby affirmed, with costs taxed in favor of appellee.

ATTEST:

THOMAS F. QUINN,
Clerk

May 18, 1971

Certified as a true copy and issued in lieu of a formal mandate on June 9, 1971.

Test: THOMAS F. QUINN,

Clerk, United States Court of Appeals for the Third Circuit.

EXCERPT FROM ARTICLE III OF THE UNITED STATES CONSTITUTION.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U. S. C. Constitution, Art. III, Sec. 2.